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Supreme Court, U.S.
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No. 05-1355

IN THE
SUPREME COURT OF THE UNITED STATES

TERRANCE MATTHEWS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Wm. J. Sheppard, Esquire
COUNSEL OF RECORD
D. Gray Thomas, Esquire
Sheppard, White, Thomas & Kachergus, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661
COUNSEL FOR PETITIONER

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ARGUMENT

I. Rule 404(b)

The issues in this case relate to whether the courts below correctly interpreted and applied the law, which are subject to review *de novo,* not for abuse of discretion. The Government provides no authority for its proposition that Fed.R.Evid. 404(b) applies to conspiracy cases differently than to others, and so the Eleventh Circuit conflicts with other circuits. Further, the Government fails to address how the jury in this case conceivably could have concluded that Matthews trafficked in numerous kilograms of cocaine without the intention to do so or to join in a conspiracy to do so. This case demonstrates the overbreadth of the Eleventh Circuit's Rule 404(b) doctrine to the point that the Rule's text, purposes and limitations are eviscerated.

Federal Rule of Evidence 404(b) precludes evidence of extrinsic acts "to prove the character of a person in order to show action in conformity therewith," but allows such evidence if relevant for another purpose, such as to prove intent. However, "[w]here intent...is a necessary conclusion from the act, and the act charged is not equivocal, proof of other offenses, even though similar in nature, will not be permitted." M.C. Slough & J. William Knightly, *Other Vices, Other Crimes,* 41 Iowa L.Rev. 325, 328-29 (1956) (citation omitted), *cited in* Fed.R.Evid. 404(b), Advisory Committee Notes.

In this case, intent is an inescapable, necessary conclusion from the acts alleged by the seven Government witnesses. As the court of appeals initially concluded:

> We cannot see how a juror would have found the witnesses credible to the extent that they described buying large quantities of cocaine from Matthews on numerous occasions over a period of more than two years and yet doubted that Matthews did, in fact, intend to involve himself in conspiracy to distribute cocaine. The suggestion is preposterous.

United States v. Matthews, 411 F.3d 1210, 1225 (11th Cir.) (*"Matthews I"*), *vacated* 431 F.3d 1296 (11th Cir. 2005) (*"Matthews II"*).[1]

> In the instant case, there is no way that a jury could have doubted that Terrance Matthews knowingly and willfully entered into a conspiracy to distribute cocaine if it found beyond a reasonable doubt that he did what his alleged co-conspirators said he did.

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[1] Contrary to *Bell v. Thompson*, 125 S.Ct. 2825 (2005), the court of appeals improperly withheld its mandate for four months after denying the Government's petition for rehearing, without entering any order to that effect, and precluded Matthews from responding before vacating the denial and its first opinion. *See* Fed.R.App.P. 30(a)(3) ("ordinarily rehearing will not be granted in the absence" of a request for an answer to a petition for rehearing). *Bell* also suggests that the court of appeals lacked jurisdiction to enter its December 2005 order and new opinion although the Court did not reach the jurisdictional issue in *Bell*.

Matthews I, 411 F.3d at 1228. As a result, the Rule 404(b) evidence was not relevant other than to show propensity and also lacked probative value ("the 404(b) evidence's incremental probity was zero") sufficient to outweigh its unfair prejudice. *Matthews I*, 411 F.3d at 1228 n.20. The inescapability of conspiratorial intent, if the jury believed Matthews did what the alleged co-conspirators said, means the Rule 404(b) evidence was not needed to prove intent, the only issue to which the Government contended that the evidence applied, an issue clearly uncontested by Matthews. As a result, the evidence was probative only of propensity, a purpose forbidden by the Rule.

Under the Government's theory, a plea of not guilty to a conspiracy charge renders admissible evidence of prior similar conduct in order to prove intent, regardless of other evidence or the manner in which the prosecution or defense is presented.

> The problem with this theory is that [it] is impossible for us to imagine a scenario under which the jury could have found that Matthews committed any of the acts described by his accusers and yet lacked the requisite guilty intent.... Here, the Government's witnesses testified to Matthews' participation in numerous large cocaine deals in 1999, 2000 and 2001. The quantities involved ranged from a single kilogram to as much as 20 kilograms at prices of $18,000 to $23,000 per kilogram. Such conduct is not open

> to an innocent explanation; that is, there was no room for Matthews to say, "well, yes, I did those things, but I did not intend to conspire to distribute cocaine."

Matthews I, 411 F.3d at 1224-25.

Further, the Government's argument that Matthews asserted "an innocent explanation" for an intercepted conversation between two alleged co-conspirators, Brief in Opposition at 7, is flatly mistaken and misleading. Matthews' closing argument simply noted that one witness who participated in that conversation testified that the conversation related to the drug ecstasy, rather than cocaine, which constituted not "an innocent explanation" but rather a contention that Matthews was not involved in the charged cocaine conspiracy at all. *See* 7/11/03 Tr. 36. Accordingly, the Rule 404(b) evidence was not relevant to anticipate or rebut a defense of an innocent explanation.

Quoting the court of appeals, the Government asserts that the jury could have concluded that Matthews did what the witnesses testified "without believing that [petitioner] intended to join a conspiracy." Brief in opposition at 8. But neither the Government nor the court of appeals can explain how the jury could have possibly reached such a conclusion, and the absurdity of such a conclusion is amply demonstrated by the Eleventh Circuit's decision in *Matthews I*. As a result, the Rule 404(b) evidence was simply not relevant to the question of Matthews' intent.

Importantly, the Government presented its Rule 404(b) evidence through the last two witnesses it presented at trial. "By the time the Government put on its 404(b) evidence, it should have been clear that the Government's case would rise or fall based on whether the jury believed that Matthews had committed the charged acts at all, not on whether he possessed the requisite guilty intent." *Matthews I*, 411 F.3d at 1225. This circumstance renders inapposite the facts of *United States v. Cardenas*, 895 F.2d 1338, 1342 (11th Cir. 1990), in which the defendant had been tried twice before on the same charges, specifically testifying that he had never been involved with drugs and did not intend to be. *Id.* at 1342 n.3. Further, *Cardenas* noted that an important factor in the admissibility determination is the posture of the case at the time that the Rule 404(b) evidence is offered, *id.* at 1343,[2] as recognized by the Eleventh Circuit's first opinion in this case. *Cardenas* also properly noted that another consideration is the strength of the Government's case on the issue of intent, *id.*, and in this case intent was beyond question if the jury believed that Matthews committed the acts charged.

The other circuits' decisions cited by the Government do not stand for such a broad theory of admissibility as the Government advocates in this case, and are distinguishable. In *United States v. Ruiz*, 178 F.3d 877, 880 (7th Cir. 1999), the only argument against the Rule 404(b) evidence was

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[2] *See also, United States v. Figueroa*, 618 F.2d 934, 939 (2nd Cir. 1980) (404(b) evidence offered to prove intent should be reserved until a point in trial when the judge can "determine whether the issue sought to be proved is really in dispute....").

temporal remoteness.[3] In *United States v. Hardwell*, 880 F.3d 1471, 1489 (10th Cir. 1996), "the theory of the defense was that defendants' presence at the motel was innocent," and as to one defendant, that he was entrapped, clearly placing intent and predisposition at issue. In *United States v. Scelzo*, 810 F.2d 2, 4 (1st Cir. 1987), the defendants argued that the prior act evidence was not sufficiently similar to the charged conduct in order to be admissible.[4]

The Government further seeks to distinguish the application of Rule 404(b) in prosecutions for conspiracy from prosecutions for substantive offenses. However, nothing in the text or history of the rule creates a different admissibility standard for conspiracy cases, *see* Fed.R.Evid. 404 & advisory committee notes, and a circuit conflict exists.[5] "There is nothing in the Rule or in logic that would

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[3] Temporal remoteness was one of the arguments raised by Matthews below, in that the Rule 404(b) evidence related to his arrest for selling street-level quantities of cocaine eight years prior to the commencement of the conspiracy charged in the instant case.

[4] Matthews also argued below the lack of similarity between selling small quantities of cocaine on the street in 1991 and selling numerous kilograms in 1999, 2000 and 2001.

[5] Contrary to the Government's argument, the court in *United States v. Zelinka*, 862 F.2d 92 (6th Cir. 1988), did not limit itself to finding that the prosecution never arituclated a theory of admissibility, but rather found the evidence "not 'probative of a material issue other than character.'" *Id.* at 99, *quoting Huddleston v. United States*, 485 U.S. 681, 686, 108 S.Ct. 1496, 1499 (1988).

treat conspiracies differently...." *Matthews II*, 431 F.3d at 1319 (Tjoflat, J., concurring).

In its brief, the Government appears to argue that this Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), created a rule of practically unlimited admissibility of Rule 404(b) evidence. That position is incorrect. First, *Old Chief* did not create such a rule. Second, the courts of appeals' decisions cited by the United States involve Rule 404(b) evidence that was clearly relevant. *See United States v. Crowder*, 141 F.3d 1202, 1204 (D.C. Cir. 1998) *(en banc); United States v. Queen*, 132 F.3d 991, 993 (4th Cir. 1997); *United States v. Johnson*, 439 F.3d 947, 95-51, 953 (8th Cir. 2006). *See also, United States v. Williams*, 238 F.3d 871, 876 (7th Cir. 2001) ("Mr. Williams' prior acts were clearly related to the specifics of the misconduct that he was charged with in the present case."); *United States v. Hill*, 249 F.3d 707, 713 (8th Cir. 2001) ("the parties do not dispute that the past crime is relevant to show Hill's intent."); *United States v. Bilderbeck*, 163 F.3d 971, 977 n.10 (6th Cir. 1999) ("The prior acts in this case were clearly *related to* the concrete events of later criminal behavior.") (emphasis in original).

The Court has not addressed the important Rule 404(b) issue raised in this case or the circuits' conflict on the question, and neither *Huddleston v. United States*, 485 U.S. 681 (1988), nor any other authority from this Court suggests that the Rule applies differently to conspiracy cases than others. In *Huddleston*, the only contested issue was the defendant's knowledge, 485 U.S. at 686, the opposite of the circumstance presented here. For these reasons, the Court should grant review.

II. *Blakely/Booker* Error

Significantly, the Government does not address the clear circuit conflict on the application of *Blakely* and *Booker* to cases pending, but already briefed, on appeal when *Blakely* was decided. The Eleventh Circuit remains alone in its unduly harsh disposition of this issue, which violates *Griffith v. Kentucky*, 479 U.S. 314 (1987).[6] The Court should review and resolve this important conflict, which continues to affect numerous cases and which will persist indefinitely on issues other than *Blakely* if not resolved.[7]

Under these circumstances, the Court should grant review of this specific and clear circuit conflict. The issue is important now in the context of *Blakely/Booker* error, and its importance will persist as other issues decided by the

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[6] The brief in opposition incorrectly asserts that the court of appeals did not address Matthews' challenge to his sentence, raised in a supplemental brief. *See United States v. Matthews*, 431 F.3d 1296, 1298 n.1 (11th Cir. 2005). Further, the manner of the Eleventh Circuit's disposition of this issue, and that court's binding precedent on the issue, prevented the issue from meeting the standards for a petition for panel rehearing, *see* Fed.R.App.P. 40(a)(2); 11th Cir. IOP-2 (11th Cir.R. 40-5), or the standard for a petition for rehearing *en banc*, *see* Fed.R.App.P. 35(b)(1); 11th Cir.R. 35-3. The Petitioner raised his sentencing arguments in the courts below and in his certiorari petition.

[7] The Petitioner agrees with the Government that a remand for further consideration of this issue is a futility in light of the court of appeals' refusal to alter its view on previous remands. *See* Brief in Opposition at 11 n.4. In light of the Eleventh Circuit's steadfast adherence to its doctrine, this Court should grant review and resolve the circuit conflict on the merits.

Court result in further conflicts between the Eleventh Circuit's waiver rule and the constitutional principle of *Griffith* recognized by the other circuits.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Wm. J. Sheppard, Esquire
Counsel of Record
D. Gray Thomas, Esquire
Sheppard, White, Thomas & Kachergus, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Counsel for Petitioner